

DELTA PROTECTION COMMISSION

14215 RIVER ROAD
P.O. BOX 530
WALNUT GROVE, CA 95690
PHONE: (916) 776-2290
FAX: (916) 776-2293



AGENDA ITEM # 7

October 30, 1998

Mr. Herbert F. Bolz, Supervising Attorney
Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

RE: Tri-TAC Request for OAL Regulatory Determination,
Office of Administrative Law Docket No. 97-007

Dear Mr. Bolz:

On behalf of the Delta Protection Commission, this letter is submitted in response to the Tri-TAC request for a regulatory determination by the Office of Administrative Law (OAL) concerning the Land Use and Resource Management Plan for the Delta Primary Zone (Plan), which was adopted on February 23, 1995, by the Delta Protection Commission (Commission).

Tri-TAC's request to OAL is a *de facto* challenge to Utilities and Infrastructure Policy P-3 ("Policy P-3"), and it should be treated as such by OAL. The only provision of the Commission's Plan which the request discusses is Policy P-3. Likewise, the only attachments to the request which present arguments in support of the request are two documents previously submitted to the Commission concerning Policy P-3. As a belated challenge to Policy P-3, the request is now outdated and moot, and should be dismissed, since the Commission has already complied with all Administrative Procedure Act requirements for Policy P-3.

Tri-TAC's exclusive focus on Policy P-3 is seen throughout its request for review. The first paragraph of the request asks the OAL to review Commission actions without specifying what those actions are, and states "Of particular concern to Tri-TAC is the policy which regulates biosolids and recycled water," in other words, Policy P-3. The request further notes (page one) that the mission and expertise of Tri-TAC consist of working on matters related to publicly operated sewage and wastewater treatment works, also called "POTWs." The only policy or provision of the Commission's Plan which is quoted or described in Tri-TAC's request is Policy P-3, which addresses sewage treatment works and the disposal or use of sewage sludge and effluent.

This exclusive focus on Policy P-3 is continued with the two attachments to Tri-TAC's request consisting of documents which were previously provided to the Commission. One such attachment, the Tri-TAC issue paper of December 20, 1994, as noted by the request (page 2) is "an issue paper to the Delta Protection Commission to discourage adoption of the policy." The second is a copy of a February 23, 1995, comment letter to the Commission opposing Policy P-3. Again, these documents solely concern Policy P-3. Moreover, Tri-TAC candidly admits that its sole purpose is to challenge Policy P-3, explaining that its "efforts to date have been ineffective in influencing the Delta Protection Commission."

Tri-TAC's request for determination by OAL is dated April 3, 1995. In April 1995, two lawsuits were filed against the Commission challenging Policy P-3, one in federal court, which was subsequently dismissed, and one in state Superior Court. In a November 1995 ruling, confirmed in a judgment issued in January 1996, the Sacramento Superior Court held that Policy P-3 was a regulation; that it had not been adopted in 1995 in compliance with the requirements of the Administrative Procedure Act (APA); and that it could not be enforced without first being adopted in conformance with APA requirements.

In January 1997 the Commission adopted Policy P-3 as a regulation in compliance with the APA's rulemaking requirements (Govt. Code §11340 et seq.). Tri-TAC participated directly in the Commission's regulatory adoption process by submitting comments. (April 1, 1996 Tri-TAC letter signed by Tri-TAC Chair Richard F. Luthy, Jr.) Tri-TAC has supplied the language of Policy P-3 included in the Plan in February 1995, but it did not provide the current language for the policy it wishes to challenge, which was adopted in 1997 as a regulation.

The Commission's new regulation became effective on February 27, 1997, after it had been reviewed and approved by OAL and filed with the Secretary of State's Office in accordance with APA requirements. (See 14 CCR §20030.) Thus, OAL has already reviewed the Commission's regulation and the final agency rulemaking file for the regulation, including the Commission's written responses to comments from Tri-TAC and others, and has approved the regulation as having been adopted in compliance with OAL review standards and the requirements of the APA. Essentially, Tri-TAC's queries regarding Policy P-3 have already been "asked and answered" both by the Commission and by OAL in its review of the regulation. Tri-TAC's 1995 request which was filed to challenge Policy P-3 should now be dismissed.

Even if Tri-TAC's offhand references to the Commission's Plan are perceived as a request for review, such a request should be rejected. The Plan contains information describing the Sacramento-San Joaquin River Delta, the Commission and its enabling statute. It also contains subject matter sections (e.g., Utilities and Infrastructure, Land Use, Recreation and Access, etc.), which include goals, findings, policies and recommendations. Plan provisions which consist of findings, goals, and recommendations are not regulations within the meaning of the APA. Further, with the exception of Policy P-3, the policy statements in the Plan are not regulations within the meaning of the APA. Rather, they largely consist of statements of existing law, statements of support and encouragement for local government efforts to assure the protection of Delta resources, and common sense goals or recommendations for using and protecting natural resources and public infrastructure in the Delta Primary Zone.

As noted by the Sacramento Superior Court in its consideration of the challenge to Policy P-3:

"...it is instructive to compare P-3 with other policies expressed in the regional plan. Many of those policies are expressed in terms of goals or general standards... (See, for example, Land Use Policy P-2; Utilities and Infrastructure Policy P-5.) ...

The Court in State Water Resources Control Board v. Office of Administrative Law, supra, 12 Cal.App.4th at 703, distinguished a regulation contained within a water quality control plan from the water quality control plan as a whole. This Court makes the same distinction between P-3, which is the specific regulation at issue here, and the remainder of the regional plan..."

(Wheelabrator Clean Water Systems, Inc., Bio Gro Systems Division v. Delta Protection Commission, No. 95-CS-00946, Ruling on Submitted Matter.)

For all of the foregoing reasons, the Delta Protection Commission respectfully submits that OAL should reject the Tri-TAC request for regulatory determination.

Attached are the required declarations to satisfy OAL's regulation 1 CCR §125. Please contact me if you should have questions concerning the Commission's response.

Sincerely,

A handwritten signature in black ink, appearing to read "Margit Aramburu", with a long horizontal flourish extending to the right.

MARGIT ARAMBURU
Executive Director

att.